Minnesota Mining and Manufacturing Company *and* Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO *and* Oil, Chemical & Atomic Workers Local Union No. 6-75, AFL-CIO. Cases 18-CA-5710 and 18-CA-5711

April 9, 1982

DECISION AND ORDER

On March 13, 1979, Administrative Law Judge Robert E. Mullin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. On December 10, 1979, the Board, having determined that this and other cases[1] involving an employer's obligation to furnish certain information regarding health and safety related data to the collective-bargaining representative of its employees presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument for January 16, 1980. Thereafter, oral argument was rescheduled to January 15, 1980, at which time Respondent, the General Counsel, Charging Party Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO (herein called Local 6-418 or the Union), and *amici curiae* presented arguments.[2] The General Counsel subsequently filed a supplemental memorandum of law.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and oral arguments, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein.

The principal issue in this case is whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide labor organizations representing its employees with information assertedly requested for collective bargaining. The information sought was of two general types: (1) Respondent's affirmative action plans, herein called AAPs, prepared pursuant to the requirements of Government nondiscrimination programs, and (2) health and safety related data. The Administrative Law Judge found both categories of information relevant to the Charging Parties' (herein called collectively the Unions) role as collective-bargaining representatives of unit employees, and therefore concluded that Respondent violated the Act by refusing to supply the information. For the reasons set forth below, we adopt the Administrative Law Judge's conclusion that Respondent unlawfully refused to provide certain of the health and safety data, but we do not adopt his conclusion that Respondent further violated the Act by refusing to supply the Unions with its AAPs.

The information requests were made by two different Locals of the Oil, Chemical & Atomic Workers International Union which represent separate units of Respondent's employees.[3] Thus, Local 6-418, the recognized representative of a unit of Respondent's hourly employees at its Chemolite Plant and warehouse facility in Cottage Grove, Minnesota, and Oil, Chemical & Atomic Workers Local Union No. 6-75 (herein called Local 6-75), representative of a unit of Respondent's hourly employees at its Saint Paul, Minnesota, facility and its Maplewood, Minnesota, 3M Research Center Site, each requested that Respondent furnish that union with a copy of its AAPs. Local 6-418 additionally requested that Respondent furnish various health and safety data regarding the Chemolite Plant, specifying in its October 27, 1977, letter requesting that data the precise information desired. Briefly, the information sought included the following: (1) morbidity and mortality statistics on all past and present employees; (2) the generic names of all substances used and produced at the Chemolite Plant; (3) results of clinical and laboratory studies of any employee undertaken by Respondent, including the results of toxicological investigations regarding agents to which employees may be exposed; (4) certain health information derived from insurance programs covering employees, as well as information concerning occupational illness and accident data related to workmen's compensation claims; (5) a listing of contaminants monitored by Respondent, along with a sample protocol; (6) a description of Respondent's hearing conservation program, including noise level surveys; (7) radiation sources in the plant, and a listing of radiation incidents requiring notification of state and Federal agencies; and (8) an indication of plant work areas which exceed proposed National Institute of Occupational Safety and Health heat standards and an outline of Respondent's control program to prevent heat disease.[4]

Respondent met with representatives of the two Locals on March 24, 1978, to discuss the information requests, but declined to supply any of the information sought by the Unions. By letter dated December 21, 1977, in response to Local 6-418's request for its AAPs, Respondent took the position

[1] *Colgate-Palmolive Company*, 261 NLRB 90, and *Borden Chemical, A Division of Borden, Inc.*, 261 NLRB 64.

[2] The American Federation of Labor and Congress of Industrial Organizations, and its Building and Construction Trades and Industrial Union Departments, presented oral argument as *amici curiae*.

[3] Each local union is signatory to a collective-bargaining agreement with Respondent, both effective from August 30, 1976, to August 27, 1979, and therefore applicable at the time of the Unions' 1977 information requests.

[4] Local 6-418's request for the health and safety information has been set forth verbatim by the Administrative Law Judge in his Decision.

that an AAP is a management tool and not a negotiable item. In response to Local 6–75's AAP request, Respondent asserted in a letter dated December 27, 1977, that Federal and state laws and Executive Order 11246 provide confidentiality to an employer with respect to AAPs, and it therefore refused to provide the requested plans. Respondent did not respond in writing to Local 6–418's request for health and safety data. However, Respondent's spokesmen, when meeting with union officials, presented various reasons why it would not provide the information. Essentially, Respondent contended that its regular safety meetings, held pursuant to a provision of its contract with Local 6–418, provide Local 6–418 with whatever is needed for its assessment of health and safety issues.

On February 16, 1978, Local 6–418 and Local 6–75 each filed unfair labor practice charges alleging that Respondent violated the Act through its refusal to furnish the above-described information.

The Administrative Law Judge found both Respondent's AAPs and the health and safety data relevant to the Unions' collective-bargaining functions. In finding the AAPs relevant, however, the Administrative Law Judge relied in part upon the fact that Respondent had succeeded in having the two Locals joined as co-defendants in a pending lawsuit filed against Respondent by the National Organization for Women (NOW). That suit, a class action alleging that Respondent has and does discriminate in its employment practices on the basis of sex in violation of Title VII of the Civil Rights Act of 1964,[5] was, at the time of the hearing, in the early stages of discovery in the United States District Court for the District of Minnesota. Respondent filed a cross-claim against the two Unions as well, asserting that, since it and they were parties to collective-bargaining agreements, the Locals shared responsibility for the policies and practices alleged to be discriminatory.

While recognizing that the Board had in a previous case found only the "Work Force Analysis" portion of an AAP presumptively relevant to collective bargaining,[6] the Administrative Law Judge nonetheless concluded that the pending lawsuit established the relevance of Respondent's entire AAPs. Thus, he concluded that the Unions are entitled to the AAPs both for their relevance to that litigation, "as well as for the purpose of assisting them in administering the collective-bargaining agreements and of negotiating to eliminate and prevent any further discrimination." We disagree.

In *Westinghouse Electric Corporation, supra*, we held that, except for certain statistics contained in the "Work Force Analysis" portion of an employer's AAP, AAPs are not presumptively relevant.[7] Therefore, a union must demonstrate relevance to be entitled to the entire plan. Subsequently, in *Automation & Measurement Division The Bendix Corporation*, 242 NLRB 62 (1979), we refused to sift through an employer's AAP in an attempt to discern that data to which the union was entitled. We held there that, while an AAP may contain certain statistical information regarding race and sex of employees to which a union, upon request, would be entitled, the union had failed to indicate with appropriate specificity the relevant information sought.[8] We adhere to that view.

In the instant case, certain portions of Respondent's AAPs likewise do not appear reasonably necessary to enable the Unions to administer their contracts intelligently and effectively.[9] Nor do Respondent's entire AAPs appear necessary for future bargaining by the Unions, since some of the material included—such as Respondent's articulation of its various goals based in part upon business forecasts related to production emphasis, plant expansion, and other similar factors—appear to fall within that area traditionally reserved exclusively for management's initial consideration.

To the extent that portions of Respondent's AAPs may be relevant in the pending Title VII litigation, the Unions may presumably obtain the information necessary to their defense of that suit through appropriate discovery proceedings of the Federal court adjudicating that matter. The Unions have not, however, demonstrated how the existence of that lawsuit renders Respondent's entire AAPs relevant under our statute. Therefore, inasmuch as Respondent's entire AAPs are not pre-

[5] 42 U.S.C. 2000e, *et seq.*

[6] *Westinghouse Electric Corporation*, 239 NLRB 106 (1978), enfd. and modified on other grounds 648 F.2d 18 (D.C. Cir. 1980).

[7] *Westinghouse, supra* at 114–115. Chairman Van de Water would not find that furnishing of the Work Force Analysis (WFA) of an employer's AAP is presumptively appropriate except in those circumstances where a union refers a substantial number of individuals for hiring, e.g., in the construction industry, and thereby becomes involved in the hiring process and is itself faced with a legal nondiscrimination duty. Absent such circumstances, he would limit the furnishing of the WFA to instances where a union has demonstrated that such information is relevant in fulfilling its collective-bargaining function. Chairman Van de Water would further find that the balance of the AAPs should not be furnished for the reasons set forth in Member Murphy's dissent in *Westinghouse, supra* at 122–124.

[8] *Id.* at 63.

[9] Respondent avers that its AAPs are comprised of the following: (1) an affirmative action statement of top executives and managers; (2) implementation provisions describing recruitment and other company policies designed to encourage minority and female employment; (3) statistical tabulations of minority and female employment included in a Work Force Analysis; and (4) a utilization analysis and narrative statement discussing hiring goals and the reasons why these goals may or may not have been met. Further, according to Respondent, the final, narrative portion of Respondent's AAPs discuss potential problems in achieving the various goals, and also contain certain related business forecasts.

sumptively relevant, and the Unions have not otherwise demonstrated the relevance of Respondent's entire AAPs or specified portions of the plans which might be deemed relevant, we shall not require Respondent to produce its AAPs.

We agree, however, as noted above, with the Administrative Law Judge's finding that the health and safety data requested by Local 6–418 is relevant to that Union's representative functions,[10] and find that the bargaining agent is entitled to full disclosure of the requested health and safety information to the extent that such disclosure is consonant with the protection of individual employees' privacy rights and with Respondent's legitimate proprietary confidentiality concerns. It is well established that health and safety are terms and conditions of employment regarding which an employer is obligated to bargain upon request,[11] and information concerning these matters is therefore relevant.

Testimony at the hearing indicated that substances which are caustic, substances which may emit beta radiation,[12] and substances either known to be or suspected of being mutagens (causing damage to the genetic material of cells), sterilization agents, and carcinogens are regularly used or produced in the Chemolite Plant.[13] Respondent has itself recognized the hazardous nature of substances to which employees are exposed, for it has required some individuals to wear radiation badges monitoring radiation emanating from certain materials handled, and it also provides protective gloves and other gear for use in handling given substances. Thus, it is clear that the work environment at the Chemolite Plant has many actual and potential dangers to the health and safety of the employees represented by Local 6–418, and that that Union's need for the information requested is not merely speculative. In this regard it appears from the record that employees exposed to harmful materials are not necessarily apprised of the range of possible risks inherent in the handling of these substances. According to John Rowan, a head operator at Chemolite, although Respondent provides employees with a safety data "standard" containing toxicological information on raw materials which they use in their work, that "standard" may vary substantially from the safety information supplied by the original vendor of the raw material. Thus, the warning provided by Respondent on its "standard" with respect to dimethyl disulfide, a raw material with which employee Rowan had worked on the preceding shift the day he testified, states as follows:

> DMDS RM 5091
>
> Has a strong, disagreeable sulfur odor. Irritating to the eyes & skin. Avoid inhalation of vapors which will cause temporary headache. Wear rubber gloves for handling.

The vendor's label affixed to a drum of the material located on the dock, in contrast, warned:

> RM 5091 (DMDS)
> Danger—Flammable
> Vapor may be hazardous or fatal if inhaled. May be harmful or fatal if swallowed. Use with adequate ventilation.[14]

Few matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well-being, or their very lives. Information of the type sought by Local 6–418 appears reasonably necessary to enable that Union to discuss and negotiate in a meaningful fashion on behalf of those whom it represents, for Local 6–418 can hardly be expected to bargain effectively regarding health and safety matters if it, unlike Respondent, knows neither those substances to which the unit employees are exposed nor previously identified health problems resulting therefrom. Accordingly, we find that the Union has a right to know, at least to the extent of Respondent's knowledge as reflected in certain of the information requested, of perceived dangers or likelihood of harm arising from the em-

[10] The Administrative Law Judge found the information relevant, *inter alia*, because it is needed for the purposes of determining whether Respondent is in compliance with the health and safety regulations imposed by the Occupational Safety and Health Administration (OSHA) and other Federal and State agencies. In concluding that the information sought is relevant and needed by the Union for the proper performance of its duties as the employees' representative, we rely not upon the obligations imposed by other agencies or statutes, but solely upon the bargaining obligation imposed by the National Labor Relations Act.

[11] *Gulf Power Company*, 156 NLRB 622 (1966), enfd. 384 F.2d 822 (5th Cir. 1967); *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976). There is, of course, no question that the parties here are cognizant of their bargaining obligations in this respect, for the applicable contract contains a health and safety provision stating, *inter alia*, "3M Company desires to continually improve its long established safety and health program and recognizes the importance of employee involvement in this program."

[12] Chlorine nitrate and thorium nitrate were identified by Rafael Moure, an industrial hygienist for the Oil, Chemical & Atomic Workers International Union, as causing concern in this regard.

[13] Moure testified that he had learned from representatives of Local 6–418 that "there are as much as 2,000 pounds of eppichlorohydron used a week on the facilities at Chemolite." Moure further testified that the OSHA standard for "exposure to this chemical [that] is five parts per million for eight hour time weighted average," and that National Institute of Occupational Safety and Health studies in animals have indicated that this chemical is a mutagen, a carcinogen, and a sterilizer. When asked whether employees had been provided instructions with respect to eppichlorohydron, Respondent's manager of toxicology, James E. Long, responded that Respondent has not instructed the employees at all regarding eppichlorohydron, although it has been a topic of discussion with company industrial hygienists.

[14] The record does not establish whether Respondent apprises all employees using raw materials of the content of the warnings supplied by the vendor.

ployees' working conditions in order that it may adequately represent the interests of the unit employees. This finding does not, however, end our consideration of the matter.

The Supreme Court has recently emphasized, in *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301 (1979), that union interests in information arguably relevant to collective bargaining do not necessarily always predominate over all other interests, however legitimate. In that case the company had refused to comply with a union request that it supply copies of the battery of aptitude tests administered to employee applicants for a particular job classification, including the actual test papers and answer sheets of the applicants and scores made by each.[15] The Board found the respondent's refusal to supply these materials to the bargaining representative of unsuccessful applicants for the available positions constituted a violation of Section 8(a)(5) and (1) of the Act, and ordered the respondent unconditionally to disclose employees' test scores to the union, as well as to turn over directly to the union the test battery and answer sheets. *The Detroit Edison Company*, 218 NLRB 1024 (1975). The United States Court of Appeals for the Sixth Circuit enforced the Board's Order without modification. *N.L.R.B.* v. *Detroit Edison Co.*, 560 F.2d 722 (1977).

In vacating the judgment of the Court of Appeals, the Supreme Court stated:[16]

> A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under §8(a)(5) turns upon "the circumstances of the particular case," and much the same may be said for the type of disclosure that will satisfy that duty.

The Court specifically noted the reasonableness of the company's concern for test secrecy, and the legitimate and substantial nature of that concern. Finding that "no principle of national labor policy [which would] warrant a remedy that would unnecessarily disserve this interest" had been cited, the Court declined to enforce the Board's Order requiring disclosure of the information directly to the union. The Court instead observed that there are situations in which an employer's conditional offer to disclose may be warranted,[17] and stressed the need for an adequate accommodation of the employer's legitimate and substantial test secrecy concerns. It is clear from the Court's discussion that, in dealing with union requests for relevant but assertedly confidential information, we are required to balance a union's need for such information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information. The accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.

In the instant case, two of the defenses urged by Respondent as justifying its refusal to comply with the Union's information request appear, at least on their face, to raise legitimate and substantial company interests possibly requiring a finding that Respondent need not disclose certain of the information, or at least need not unconditionally disclose it. Specifically, Respondent claims that the release of medical information sought by the Union would violate the physician-patient privilege and confidentiality of individual employee medical records, and that supplying a list of the generic names of all substances used and produced at the Chemolite Plant would reveal its trade secrets.[18]

With respect to the medical confidentiality question, the Administrative Law Judge found that Local 6-418 had at no time requested the names of any individual employees, and that this was clear from its original request contained in the letter of October 27, 1977, wherein Local 6-418 proposed that confidentiality of medical records be safeguarded through the use of physicians to interpret

[15] Nonunit applicants were selected by the employer for the job openings, and the union sought the information requested for purposes of processing a grievance filed on behalf of the unsuccessful applicants whom it represented.

[16] *Detroit Edison Company* v. *N.L.R.B.*, *supra* at 314.

[17] The Court, in dicta, suggested that conditioning the disclosure of test scores upon the consent of the employees whose grievance was being processed—an accommodation which had been suggested by the respondent but rejected by the union—was justified in the circumstances.

The respondent had also offered to turn over the test battery and answer sheets to an industrial psychologist selected by the union for an independent evaluation; this compromise was also rejected by the union. Although the Administrative Law Judge had ordered the respondent to turn over the employees' test scores directly to the union, he had accepted the respondent's suggestion that the actual test battery and answer sheets be disclosed only to an expert intermediary on the union's behalf. The Administrative Law Judge further directed that the tests and answer sheets be returned to the respondent upon completion of the arbitration proceeding, and that the union be allowed to see and study the tests but not to copy or otherwise disseminate the tests or questions. The Board, reversing the Administrative Law Judge's conclusion that the test battery and answer sheets need be turned over only to a qualified psychologist, ordered that they be made available directly to the union. The use restrictions recommended by the Administrative Law Judge were, however, adopted by the Board.

[18] The other defenses raised by Respondent—burdensomeness, costliness, and waiver—do not, in our view, warrant closer scrutiny than that accorded them by the Administrative Law Judge in his Decision. As stated therein, if substantial costs would in fact be incurred by Respondent in supplying the information, the parties may bargain as to the allocation of those costs and, if no agreement can be reached, the Union is entitled, to the extent otherwise provided herein, to access to records from which it can reasonably compile the information. *Food Employer Council, Inc., et al.*, 197 NLRB 651 (1972); *Westinghouse Electric Company, supra.*

and analyze the documents. The Administrative Law Judge also found the fact that Local 6–418 did not seek individually identified medical data to be evidenced by its willingness to have Respondent remove from the data any information which would reveal the identity of the individual whose records were being studied.[19] While the Union's October 27 letter was somewhat ambiguous on this score, we find that the record, including testimony such as that quoted below, amply supports the Administrative Law Judge's finding that the Union does not seek individually identified records.[20] To the extent that supplying the Union with statistical or aggregate medical data may result in the unavoidable identification of some individual employee medical information, we find that Local 6–418's need for medical data potentially revealing past effects of the workplace environment upon those whom it represents outweighs any minimal intrusion upon employee privacy implicit in the supplying of aggregate data such as that sought. We therefore adopt the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply the bargaining agent with employee health and medical information to the extent that that information does not include individual medical records from which identifying data[21] have not been removed.[22]

With respect to Local 6–418's request for a list of generic names of all substances used and produced at the Chemolite Plant, Respondent asserts that disclosure of such information would impinge upon Respondent's proprietary interests due to the potential for revelation of Respondent's trade secrets to possible competitors. However, Respondent has not substantiated its claim in this regard. At the March 24, 1978, meeting between Respondent and union representatives at which the Union's request letter was discussed, Respondent took the position that those items sought by Local 6–418 were not the Union's business, and that the Union need not concern itself because company hygienists were already taking care of those matters about which the union representatives expressed concern. Respondent's specific response to the item asking for the listing of generic names was, in the words of Union Representative Potthoff who was present at the meeting, that "that raw data would do us no good." Thus, Respondent refused to supply the generic names of *any* of the substances used or produced at the Chemolite Plant.

Respondent's patent liaison officer, William Perlson, testified at the hearing, however, that he could think of only 5 or 10 of approximately 700 items produced at the Chemolite Plant, and only 1 raw material used there, which, if known to a competitor, might damage Respondent's competitive position. It is therefore evident from Perlson's testimony that, with respect to the vast majority of the materials sought, the trade secret defense would have no relevance. Further, the possibility that the listing of generic names requested may include some which Respondent asserts to constitute trade secrets does not excuse Respondent from complying with the request to the extent that it includes information as to which no adequate defense is raised. *Fawcett Printing Corporation*, 201 NLRB 964 (1973).[23] Accordingly, we find that Respondent breached its collective-bargaining obligations when it refused to provide to the Union a listing of those substances requested which would admittedly not compromise any proprietary advantage, and thereby violated Section 8(a)(5) and (1) of the Act. We

[19] Thus, industrial hygienist Moure, who participated in formulating the information request letter sent to Respondent, testified at the hearing as follows:

> We are not interested in getting the names of the people. We are not interested in violating the confidentiality between the doctor and the patient. It is our opinion it is violated when companies have the results of what are the diseases of people [sic].
>
> We are not interested in that. We are interested in gross results. We are interested in finding out that there are 15 people in that department and there were 15 blood samples and they are all normal or there are three abnormal. We are not interested in the names . . . .

And,

> We are not interested in getting the name of anybody or finding [out about] the private life of anybody. What we are interested in is to find out if somebody is working with a substance and has a medical condition, if that medical condition is related to the substance he has handled.
>
> Our interest is representational, a group of people. . . .

[20] We note moreover that, at a joint conference held on March 24, 1978, in response to the Union's October 27 letter, Respondent did not decline merely to give to the Union those items which included individually identified employee data, or suggest means by which records might reasonably be "sanitized" by removal of identifying material, but rather flatly refused to supply any of the information sought. Respondent instead explained aspects of its own industrial hygiene programs.

[21] Examples of such data are, but are not necessarily limited to, names, addresses, social security numbers, and payroll identification numbers.

[22] The Administrative Law Judge further noted that where the medical history of individual employees is "patently relevant to the Union's effort to promote occupational safety for these same employees," the confidential privilege between physician and patient perhaps need not be honored. Inasmuch as we have found that information as to individuals was not requested, we find it unnecessary to pass upon the Administrative Law Judge's comments in this regard.

[23] We reject Respondent's contention that the overly broad nature of the Union's request relieves it of any obligation to comply. The record does not indicate that Respondent either sought specific clarification or raised issues of costliness or burdensomeness with respect to the Union's request in its initial dealings with union representatives at the March 24, 1978, meeting. Union Representative Potthoff testified without contradiction that he was not asked specifically what was meant by any of the items in the Union's request letter. While the Union did not alter its request at the conclusion of that meeting, it had indicated in its October 27, 1977, letter that it would accept requested information in any format under which the Company might choose to proffer it, and would appreciate receiving any part of the information which was readily available as quickly as possible. In the posture of this case, where Respondent made a blanket refusal to give any of the information, we reject its argument that the Union's request was too broad and therefore not entitled to be honored.

shall therefore order Respondent to turn over to the Union a listing of those substances used and produced at the Chemolite Plant as to which Respondent asserts no trade secret defense.[24]

As to those substances the names of which Respondent claims to constitute trade secrets, we agree with the Administrative Law Judge that the parties should bargain in good faith regarding conditions under which needed information may be furnished to the Union with appropriate safeguards protective of Respondent's legitimate proprietary interests yet maintained.[25] These parties have enjoyed a long, and apparently amicable, bargaining relationship extending over a period of more than 25 years, and it may well be that they will reach an accord which will satisfactorily accommodate their countervailing interests in the present controversy. While we have found that the generic names of substances to which bargaining unit members are exposed in their workplace constitute information needed by their bargaining representative, we shall not engage in the full balancing of countervailing rights discussed by the Supreme Court in *Detroit Edison, supra*, before first affording these parties an opportunity to reach an accommodation on their own. They would be in the best position to develop necessary methods and devices for the information exchange through the traditional collective-bargaining mechanism.[26]

We recognize that, if the Union and Respondent are unable to reach agreement on a method whereby their respective interests would be satisfactorily protected, these parties may be before us again. If the issue of whether the parties have bargained in good faith is presented to us, we will, of course, look to the totality of the circumstances in determining whether or not both have bargained in good faith.[27] If necessary, we shall undertake the task of balancing the Union's right of access to data relevant to collective bargaining with Respondent's expressed confidentiality concerns in accordance with the principles set forth in the Supreme Court's *Detroit Edison* decision. However, we believe that first allowing these parties an opportunity to adjust their differences, in light of the above findings, best effectuates the National Labor Relations Act policy of maintaining industrial peace through the resolution of disputes by resort to the collective-bargaining process.

In summary, we adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply to the Union health and safety information requested to the extent that such data does not include individual medical records from which identifying data have not been removed, or Respondent's trade secrets. Insofar as Respondent avers that supplying the bargaining agent with information sought would compromise the confidentiality of proprietary information, we first rely on the collective-bargaining process and the good-faith negotiations of the parties to determine conditions under which information may be furnished to the Union while maintaining appropriate safeguards to protect Respondent's legitimate interests. We shall therefore order Respondent to supply to the Union the former information, and to bargain in good faith with regard to the latter.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Minnesota Mining and Manufacturing Company, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical & Atomic Workers Local Union No. 6–418, AFL–CIO, in conjunction with the appropriate bargaining unit at the Chemolite Plant for which Local No. 6–418 is the bargaining agent, by refusing to furnish the latter union the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions, to the extent that such information does not include individual medical records from which identifying data have not been removed.

(b) Refusing to bargain collectively with Local Union 6–418 by refusing to furnish that Union the generic names of all chemicals and substances used and produced at the Respondent's Chemolite Plant,

[24] As noted above, Respondent's witness Perlson testified that he could think of only a very limited number of substances the mere names of which might constitute trade secrets. While there may be substances in addition to those mentioned by Perlson possibly constituting trade secrets, we regard the approximate figures recited by him as a rough guide to the number of generic names which may legitimately be exempt from disclosure pursuant to this order. Consequently, any number of generic names substantially at variance with the evidence adduced by Respondent in this regard will be most carefully scrutinized. Further, insofar as Respondent's refusal to produce any of the information may be grounded upon an argument that all of the elements taken together or in combination would reveal a trade secret, we reject that contention.

[25] *The Ingalls Shipbuilding Corporation*, 143 NLRB 712 (1963); cf. *American Cyanamid Company (Marietta Plant)*, 129 NLRB 683 (1960).

[26] This is not, however, to avoid resolution of the controversy before us, for Respondent has not heretofore acknowledged that information of the kind sought by the Union is relevant to the latter's collective-bargaining functions absent some specific grievance or controversy. We find that it is.

[27] *Rhodes-Holland Chevrolet Co.*, 146 NLRB 1304 (1964). Substantiation of various positions asserted by the parties would, obviously, be an important element of any such evaluation.

excepting those substances the names of which constitute Respondent's proprietary trade secrets.

(c) In any like or related manner refusing to bargain collectively with Local Union 6–418, or interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Furnish Local Union 6–418 the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions to the extent that such information does not include individual medical records from which identifying data have not been removed.

(b) Furnish Local Union 6–418 the generic names of all chemicals and substances used and produced in the Respondent's Chemolite Plant which do not constitute Respondent's proprietary trade secrets.

(c) Upon request, bargain collectively in good faith with Local Union 6–418 regarding its request for the furnishing of a list of the generic names of all chemicals and substances used and produced at the Chemolite Plant, insofar as the request relates to items which are Respondent's proprietary trade secrets, and thereafter comply with the terms of any agreement reached through such bargaining.

(d) Post at its Chemolite Plant copies of the attached notice marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER HUNTER, concurring:

I agree with my colleagues that Respondent's refusal to supply the Union with affirmative action plans was lawful, but that its refusal to furnish certain health and safety data violated Section 8(a)(5) of the Act. I further join them in holding that Respondent must disclose the names of substances it uses and produces as to which it raises no trade secret defense. Where Respondent does raise a trade secret defense, the parties are asked to bargain for mutually agreeable conditions which will satisfy the Union's need for the information while protecting Respondent's proprietary interests. In joining the majority, I emphasize the *conditional* nature of the duty to disclose, and the requirement that the Board be vigilant not only in protecting the legitimate right of the employees' bargaining agent to this information but also the equally legitimate concerns of the employer. In this respect, as the majority recognizes, the Supreme Court's decision in *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301 (1979), is our guide.

As for the first findings I agree with Chairman Van de Water that, contrary to the majority view expressed in *Westinghouse Electric Corporation*, 239 NLRB 106 (1978), the "Work Force Analysis" portion of an affirmative action plan is not presumptively relevant to a labor organization's function as collective-bargaining representative but rather relevance must be established in light of the particular circumstances of each case. Again in agreement with Chairman Van de Water, I believe that Member Murphy's dissent in *Westinghouse, supra*, sets forth cogent reasons predicated on overriding policy considerations why the balance of the affirmative action plans should not be furnished even when a labor organization succeeds in demonstrating facially persuasive relevance. In sum, along with the present Chairman and with former Member Murphy, I believe this Board should recognize that in this area the particular interest of a party must yield when it conflicts with, and interferes with, objectives expressed in national policy.

As stated previously, I also concur in my colleagues' finding that this Respondent violated Section 8(a)(5) of the Act by its blanket refusal to furnish certain health and safety records. In so finding, however, I must emphasize that here we are not requiring Respondent to release the medical records of individuals, rather it is required to provide only statistical or aggregate employee medical data. In this connection, I note that Respondent's medical director testified that excising from the medical records in issue here specific information such as employee number, social security number, and the like would in all probability protect the right to privacy of individual employees.

I also note that my colleagues seem to suggest that, even where supplying a labor organization with statistical or aggregate medical data might result "in the unavoidable identification of some individual employee information," they would re-

[28] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

quire the furnishing of that information based on their conclusion that the labor organization's "need" for such information "outweighs any minimal intrusion upon employee privacy." I am rather less sanguine about this conclusion than are my colleagues since, in my view, it may well be at odds with the principles that underlie the teaching of the Supreme Court in *Detroit Edison, supra.*[29] However, as indicated previously, I need not reach that issue on the facts presented here.

Finally, we come to the extremely delicate area of disclosure of product information. Our duty is to balance the health and safety interest of the employees against the business confidentiality and proprietary interests of Respondent in maintaining the secrecy of the composition of its products. We have recognized that the Union has a right to a list of the generic names of the products used in the plant relevant to employee health and safety. That right, however, is limited. Respondent does not have a duty to disclose information otherwise relevant which would constitute a trade secret or damage its competitive position, but only to bargain in good faith over the request for such information, including the feasibility of disclosing such information in a manner that will adequately safeguard its legitimate proprietary interests. As noted earlier, we have at the present time left it to the parties to negotiate a mutually agreeable compromise which will accommodate the legitimate interests of both parties. Like my colleagues, I believe strongly that the parties should be given an opportunity through the free play of collective bargaining to hammer out the procedures by which these various interests can best be accommodated. By our Decision today we give the parties that opportunity. I trust they will make the most of it.[30]

MEMBER JENKINS, concurring in part and dissenting in part:

Although I agree with my colleagues in all other respects, I differ with them concerning the limits on the requirement that Respondent furnish to the Union the generic names of substances used or produced, and their finding that the Union is not entitled to the affirmative action plans.

[29] The policy considerations here are somewhat similar to those in *Detroit Edison*. Medical information, like testing information, is sensitive and of a kind which employees reasonably expect to be confidential.

[30] If they cannot agree, we are then faced with the very difficult question of how the Board will determine the validity of a trade secret defense since this is an area in which we have little expertise—and the extent to which the Board can alleviate an employer's concerns about confidentiality by issuing a protective order. These are problems which may require creative solutions from the Board if we are to follow the command of the Supreme Court in *Detroit Edison* not to permit "union interests . . . [to] predominate over all other interests, however legitimate . . . ." 440 U.S. at 318. We must accommodate the competing concerns of both parties.

1. Generic names of substances used and produced

I agree with the majority decision that the information is relevant and I endorse the statement therein that "[F]ew matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well-being, or their very lives." Having found relevance on that basis, it seems we have already balanced the Union's right to this information against Respondent's claimed confidentiality.

This is not to say that I would require Respondent unconditionally to furnish the requested information which is claimed by Respondent to be confidential; but it must be emphasized that confidentiality is not a defense to an obligation to furnish relevant information. Once it is determined that Respondent must furnish the requested information, I would leave to the parties to determine between themselves the conditions under which the Union's right of access to such information may be accommodated to Respondent's proper concern not to have business information of a confidential character revealed to its competitors.[31] In my view, such a requirement satisfies the concerns expressed by the Supreme Court in *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301 (1979). Indeed, this requirement is consistent with the access standards of the Occupational Safety and Health Administration. See OSHA Occupational Safety and Health Standards 29 C.F.R. § 1910.20(f) (1980). See also 46 Federal Register 152 (1981) and 47 Federal Register 54 (1982).

2. Affirmative action plan

The majority, following *Westinghouse Electric Corporation*, 239 NLRB 106 (1978), finds that the Union is not entitled to Respondent's affirmative action plans (AAPs).

In *Westinghouse*, the Board found that certain statistical data relating to employment practices were presumed relevant to the collective-bargaining process. However, with respect to the AAPs, the Board found that the information required therein, such as projections, goals, and timetables, unlike statistical data, did not appear to be reasonably necessary to enable the Union to administer its contract intelligently and effectively. Subsequent to *Westinghouse*, we have decided many cases involving AAPs. Having reexamined the issue, I am convinced that the distinction made in *Westinghouse*

[31] *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 718 (1963).

between statistical data and the other information contained in the AAPs is invalid. As the same considerations apply, the Board should find that AAPs are presumptively relevant to the Union's role as collective-bargaining representative.

The AAP contains statistical data concerning the current employment statistics for the facility, broken down by race and sex (this is the work force analysis, most of which the Board has found to be presumptively relevant). An AAP must also include "an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his workforce where deficiencies exist." See 41 CFR §60-2.10 (1980). This has been referred to as the "underutilization analysis," and includes detailed projections and procedures for reaching specific goals in assignments, hires, transfers, and promotions.

As the bargaining representative of the employees, the Union has a vital interest in commitments made which affect Respondent's personnel policies. The Union needs to know of these commitments, not only to police its contract, but also to suggest alternative causes of action, and for further negotiations. Indeed, it is Office of Federal Contract Compliance Programs (OFCCP) policy that Unions be involved in the development of affirmative action programs. See 41 CFR §60.2.21(a)(6) (1980).

Administrative Law Judge Reis' analysis in *General Motors Corporation*, 243 NLRB 186, 194–195 (1979), bears repeating:

> What is plainly called for here is mature acceptance of the implications of this particular controversy. Redress for past discriminatory practices and prevention of future ones are as fundamental to the preservation of this society as any project upon which the nation is now embarked. This is not—or ought not be—still another traditional battleground on which the perceived opposing interests of labor and management clash. It is, rather, a struggle in which the interests of capital and labor must be seen as common, requiring a pooling of strength, knowledge, and will, in order to destroy a virulent enemy which may well otherwise destroy both of them. To the extent that union awareness of existing corporate data relating to the possible presence of discrimination and union access to corporate plans and methods for its elimination can be helpful in that effort, it seems obvious that such information should be made available to the Union.

I would find that the Union is entitled to the affirmative action plan, except that Respondent's "business forecast" statements and items relating to employees outside the unit may be deleted therefrom.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Oil, Chemical & Atomic Workers Local Union No. 6–418, AFL–CIO, by refusing to furnish that Union the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions, to the extent that such information does not include individual medical records from which identifying data have not been removed with respect to the employees for which Local 6–418 is the bargaining agent.

WE WILL NOT refuse to bargain collectively with the aforesaid Local Union 6–418 by refusing to furnish that Union the generic names of all chemicals and substances used and produced at our Chemolite Plant, except for those substances the names of which constitute our proprietary trade secrets.

WE WILL NOT in any like or related manner refuse to bargain collectively with the aforesaid Union, or interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

We will furnish the aforesaid Local 6–418 the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions to the extent that such information does not include individual medical records from which identifying data have not been removed.

WE WILL furnish the aforesaid Local 6–418 the generic names of all chemicals and substances used and produced at our Chemolite Plant, except for those substances the names of which constitute our proprietary trade secrets.

WE WILL, upon request, bargain collectively in good faith with Local 6–418 regarding its

request for the furnishing of a list of the generic names of all chemicals and substances used and produced at our Chemolite Plant insofar as the Union's request relates to items which are our trade secrets, and WE WILL comply with the terms of any agreement reached through that bargaining.

MINNESOTA MINING AND MANUFACTURING COMPANY

DECISION

STATEMENT OF THE CASE

ROBERT E. MULLIN, Administrative Law Judge: This case was heard on June 15, 1978, in Minneapolis, Minnesota, pursuant to charges duly filed and served,[1] and an order consolidating cases, complaint and notice of hearing issued on April 26, 1978. The complaint presents questions as to whether the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. In its answer, duly filed, the Respondent conceded certain facts with respect to its business operations, but it denied all allegations that it had committed any unfair labor practices.

At the hearing, all parties were represented. All were given full opportunity to examine and cross-examine witnesses, and to file briefs. The parties did not request oral argument. On August 10, 1978, briefs were submitted by the General Counsel and the Respondent.[2]

Upon the entire record in the case, including the briefs of counsel, and from his observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation (hereinafter also known as 3M or Employer), maintains its principal office and place of business at what is known as The 3M Center, in Maplewood, Minnesota. It has approximately 100 plant sites throughout the United States and a total of from 40,000 to 45,000 employees at those various locations.[3] Among the Respondent's facilities are a plant in St. Paul, Minnesota, herein called the St. Paul Plant, and another in Cottage Grove, Minnesota, herein called the Chemolite Plant. At these facilities the Respondent is engaged in the manufacture, sale, and distribution of abrasives, tapes, and related products. Only the 3M Research Center at Maplewood and the plants at St. Paul and Cottage Grove are involved in this proceeding.

During the year ending December 31, 1977, a representative period, the Respondent, in the course and conduct of its business, purchased and caused to be transported and delivered to the aforesaid plants, goods, and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its 3M Center, St. Paul Plant, and Chemolite Plant directly from points located outside the State of Minnesota. During the same calendar year, in the course and conduct of its business, the Respondent manufactured, sold, and distributed at its 3M Center and at its St. Paul and Chemolite Plants products valued in excess of $50,000, of which amount products valued in excess of $50,000 were shipped from said places of business directly to points located outside the State of Minnesota.

Upon the foregoing facts, the Respondent concedes, and it is now found, that Minnesota Mining and Manufacturing Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local Unions No. 6–75 and 6–418, of Oil, Chemical & Atomic Workers, AFL–CIO, are labor organizations within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Respondent and the Charging Unions have had collective-bargaining agreements extending over a period of more than 25 years. Only one strike has occurred throughout this long period of generally amicable collective-bargaining relations.

The Respondent conceded that at all times material Local 6–75 has been the exclusive representative of all employees in the appropriate unit at the St. Paul Plant and the 3M Research Center[4] and that, similarly, Local 6–418 has been the exclusive representative for the appropriate unit at Chemolite.[5] Further, at each of those locations the respective local union has a collective-bargaining agreement with the Respondent.

In a letter dated May 19, 1977, Donald N. Buck, president of Local 6–418, wrote to the Respondent requesting that it furnish the Union a copy of its affirmative action program (herein AAP) for assistance in future collective bargaining and for policing the existing collective-bar-

[1] The charges in both of the above-numbered cases were filed on February 16, 1978.

[2] Subsequent to the close of the hearing, counsel for the parties submitted certain stipulations as to the admission into the record of an affidavit by V. J. Michaelson. By order dated July 5, 1978, these stipulations and the Michaelson affidavit were marked as Jt. Exhs. 1, 2, and 3, and received in evidence.

[3] From the testimony of Dr. Frank Ubel, medical director for the Respondent.

[4] The parties agreed, and it is now found, that an appropriate unit of these employees within the meaning of Sec. 9(b) of the Act is as follows:

> All full-time and regular part-time hourly paid employees employed by the Respondent at its Saint Paul, Minnesota facility and at its Maplewood, Minnesota 3M Research Center Site, including all production and maintenance employees, machine shop employees, receiving department employees, and warehouse employees; excluding all boiler room employees, clericals, watchmen, guards and supervisors as defined in the Act.

[5] The parties further agreed, and it is now found, that an appropriate unit at the Chemolite Plant is:

> All full-time and regular part-time hourly paid employees employed by the Respondent at its Chemolite Plant and warehouse facility located in Cottage Grove, Minnesota, including all production and maintenance employees, maintenance department employees, receiving employees, and maintenance shop stock room clerks; excluding all boiler room employees, clericals, office employees, watchmen, guards and supervisors as defined in the Act.

gaining agreement. In a letter dated December 21, 1977, Bernie Curti, personnel manager for Chemolite, denied the Union's request on the ground that the information requested was a management tool and not a negotiable item.

In another letter dated October 27, 1977, Local 6–418 requested that the Respondent furnish the local union with various health and safety data involving the Chemolite Plant. About a month later, Personnel Manager Curti informed officials of Local 6–418 that the Respondent would not comply with this request.

In letters dated November 8, 1977, and December 22, 1977, Arthur G. Potthoff, the then president of Local 6–75, wrote the Respondent requesting that it furnish the local with copies of any affirmative action program or other agreements entered into between the Respondent and Federal or state agencies. In a response dated December 27, 1977, the Respondent stated that because of the requirement of confidentiality as to its AAPs it would not provide the data requested.

On March 24, 1978, representatives of both Locals met with officials of the Respondent to discuss the above-described requests. At that time the Respondent's representatives asserted that information as to its AAP and the AAP itself was not relevant to any of the Union's responsibilities because it was a commitment between the Respondent and the Office of Federal Contract Compliance established under the authority of Executive Order 11246 to which the Union was not a party. Subsequent to that meeting the Respondent, in a letter dated March 28,[6] sent to Union Representative Potthoff a single paragraph from its AAP which referred to bargaining unit employees. This read as follows:

> All production and maintenance position vacancies, recalls, transfers, reductions, layoffs, etc., will be in accordance with the current Labor Management Agreement.

No other information as to its AAPs was ever provided. Similarly, the Respondent never supplied any substantive information as to Local 6–418's request for occupational health and safety information which that Union initially requested in its letter of October 27, 1977.

In his letter Potthoff stated that this information would be used to evaluate the Union's course of action in administering its current agreement and with reference to future negotiations with the Respondent. At the hearing Potthoff testified that an additional reason for the request was the fact that the Union had been named as a co-defendant in a lawsuit which had been filed by the National Organization for Women (NOW) in the United States District Court for Minnesota.

The latter case arose out of charges which NOW had filed in 1974 with the United States Equal Employment Opportunity Commission (herein EEOC) which alleged that both the Respondent and the Oil, Chemical & Atomic Workers International Union (herein International) had discriminated against women and racial minorities with respect to hiring, compensation, promotion, and other terms and conditions of employment. Thereafter, NOW filed an action against the Respondent in the United States District Court for Minnesota wherein it alleged that the Employer's personnel practices had violated Title VII of the Civil Rights Act of 1964. In their prayer for relief the plaintiffs requested that the Respondent be required to eliminate its discriminatory employment practices, establish an effective AAP, provide the individual plaintiffs certain backpay and award the plaintiffs and their class $50 million in punitive damages. Subsequently, the Respondent moved to compel the joinder of Local 6–75 and Local 6–418. On January 25, 1977, the court granted this motion, thus making the two Locals defendants in the lawsuit. In addition, the Respondent herein filed a cross-claim against the two Locals wherein it alleged that, since it and they were parties to collective-bargaining agreements, the locals shared responsibility for the policies and practices which were alleged to be discriminatory and that the two Locals should be expressly bound by any declaratory or injunctive relief which the court awarded the plaintiffs. The cross-claim further requested that, in the event NOW should be awarded monetary relief against the Respondent with respect to the employees represented for purposes of collective bargaining by the two Locals, the Respondent be entitled to indemnification and/or contribution from those Locals. In the present case, counsel for the General Counsel and the Respondent stipulated that the proceeding in the United States District Court is procedurally in the early stages of discovery and that there has been no resolution regarding the merits of the aforesaid allegations.

B. *The Alleged 8(a)(5) and (1) Violations; Findings and Conclusions With Respect Thereto*

It has long been settled that the employees' exclusive bargaining agent is entitled to such information from the employer as is relevant and necessary to the fulfillment of its obligation fairly and properly to represent the employees in the bargaining unit. *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956); *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967). Moreover, the union's right to such information extends not only to the period when it is negotiating a contract, but also during the life of the agreement for the purpose of administering or effectuating its terms, as well as preparing for future or prospective negotiations. *The A. S. Abell Company*, 230 NLRB 1112 (1977); *Western Massachusetts Electric Company*, 234 NLRB 118 (1978).

Information that bears directly on the negotiation or administration of a bargaining agreement is presumptively relevant. The standard for ascertaining the need for such information is a showing of "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *N.L.R.B.* v. *Acme Industrial Co., supra; General Electric Company*, 199 NLRB 286, 288–289 (1972); *Brooklyn Union Gas Company*, 220 NLRB 189, 191–192 (1975); *Globe Stores, Inc., et al.*, 227 NLRB 1251, 1254 (1977); *Temple-Eastex, Incorporated, etc.*, 228 NLRB 203, 204 (1977). In effect the employer's responsibilities in this regard are predicated on the union's need for such

[6] All dates hereinafter, unless otherwise noted, are for the year 1978.

information in the fulfillment of its obligations to the employees in the unit.

1. The Respondent's refusal to supply the Unions with its AAPs

The Board recently held that information relating to possible race and sex discrimination is relevant to a union's role as collective-bargaining representative. *Westinghouse Electric Corporation*, 239 NLRB 106 (1978); *The East Dayton Tool and Die Co.*, 239 NLRB 141 (1978). Consequently, it must be found that, since the two Locals here, as statutory bargaining representatives, have a legal obligation to insure that discriminatory practices are not established or continued, they are entitled to information as to race and sex which relates to alleged discrimination. In *Westinghouse* the Board held that the union there involved had established that it was entitled to the work force analysis which was contained in that employer's AAP, but that the charging party had not demonstrated a need or relevance for the entire AAP.

Here, the Charging Unions were not prompted to seek affirmative action information from the Respondent until the latter succeeded in joining them as party defendants in a multimillion dollar lawsuit in which discrimination as to race and sex was an issue, and, thereafter, in a cross-claim in that action the Respondent requested that if NOW should be awarded monetary relief against 3M with respect to the employees represented by Locals 6–75 and 6–418, it should be entitled to indemnification and/or contribution from those Locals.

In *Westinghouse* the charging union did not contend that any violations had occurred because of the AAP, and the Board was not willing to allow the union to go on what it described as a "fishing expedition" to look for possible violations. In this case, however, there need be no speculation on this score. The Unions involved in this case are co-defendants in a suit instituted against the Employer for specific alleged violations relating to sex discrimination.

The Unions here, in their role as collective-bargaining representatives, seek this information in order to police the present contract and to negotiate new ones. As stated in *The East Dayton Tool and Die Co.*, the union does not have to cite particular provisions of the contract which it seeks to police:

> In these circumstances, we do not see any persuasive reason for requiring the Union to cite specifically the contract provisions, i.e., to say the "magic words," in order to find that the information is relevant to the Union's right to police the contract. We further conclude that the Union's expressed concern that it may be required to defend against a charge of unlawful discrimination based on alleged acquiescence in Respondent's hiring practices is not inconsistent with its representative function. [239 NLRB 141, 142 (1978).]

Once having demonstrated the very real dispute concerning alleged violations relating to the AAPs, the Unions should be able to gain access to the Employer's information. The fact that they might also seek to use the information gathered from the AAPs in court proceedings is unimportant. "If information is relevant to collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use it to attempt to enforce statutory and contractual rights before an arbitrator, the Board, or a court." *Westinghouse, supra* at 110–111. Moreover, the fact that litigation under Title VII of the Civil Rights Act of 1964 is going on does not restrict the Unions' right to information concerning alleged discrimination. *Westinghouse, supra* at 111. Finally, with respect to the issue of confidentiality raised by the Respondent both at the hearing and in its brief, it does not appear that giving the AAPs to the Unions would mean that the information is being made "public." In any event, an employer and/or contractor, must meet and discuss with the bargaining agent for its employees the formulation of its AAP. See, 41 CFR 60–2.21(a)(6).

In light of the foregoing findings, it is my conclusion that in this case the Charging Unions are entitled to the Respondent's AAPs insofar as they relate to the bargaining units involved here, both for their relevance to the pending litigation in which the Respondent has succeeded in involving the locals, as well as for the purpose of assisting them in administering the collective-bargaining agreements and of negotiating to eliminate and prevent any further discrimination.[7] By its refusal to provide this information which the Union requested, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. The Respondent's refusal to supply the Union with occupational health and safety data

In a letter dated October 27, 1977, Buck, president of Local 6–418, sent the following request to Curti, personnel manager for the Chemolite Plant:

> Dear Bernie:
>
> This Local Union requests the Company to submit the following information in order that it may properly carry out its representation responsibilities under the collective bargaining agreement.
>
> (1) The morbidity and mortality statistics and basic data from which these were calculated on all past and present employees.
>
> (2) The generic names of all substances used and produced at Chemolite Plant.
>
> BIOLOGICAL
>
> (3) All results of clinical and laboratory studies undertaken of any employee. All results of toxicological and experimental laboratory investigation concerned with toxicological agents that employees may be exposed to. This should include data availa-

[7] In its brief the Respondent asserts that the Union is not a party to the development of its AAP under Executive Order 11246 because this plan is the Respondent's sole responsibility. In fact, the Federal Office of Contract Compliance urges that the employer secure the involvement of its employees' collective-bargaining representative in the development and implementation of an AAP from the very outset of its formulation. There is no evidence in the record that the Respondent ever sought the participation of Locals 6–75 and 6–418 in the development of its AAPs.

ble to the company in these matters whether or not undertaken by a company unit as well as all data relevant to these subjects to which the company is aware. Also all health related information derived from any insurance program covering employees covered under the collective bargaining agreement as well as all information concerning occupational illness and accident data related to workmen's compensation claims.

It is agreed that review of this information will be undertaken by licensed physicians with medical confidentiality maintained with respect to any individual employee.

INDUSTRIAL HYGIENE

(4) Which contaminants are monitored by the company. The method of sampling used such as time integrated, spot sample, personal, breathing zone, fixed location. A sample protocol should be provided to the Union. How does the company calibrate sampling rates on sampler. What is the analytical method, its sensitivity and the internal method of calibration. Does your laboratory participate in the P. A. T. program under NIOSH? All historical monitoring data (coded). Engineering control program. Type of control, types of hoods and general exhaust information, design base, dilution volumes, volume of work, area, capture velocity, exhaust volume and a statement stating effectiveness of control.

Describe your hearing conversation program including periodic audiometric examination, noise level surveys and engineering control measures which are in effect.

Describe the uses of radiation sources in the plant noting source type and activity if isotopes are used; Note machine sources of radiation. Indicate the radiation protection program in effect at the plant. List the incidents which require the notification to state and federal agencies. Describe monitoring.

Indicate work areas which exceed the heat standard proposed in the NIOSH criteria document. Outline the engineering and medical control program in the plant designed to prevent heat disease.

Please be assured that this Local Union requests the above information for the sole purpose of pursuing its representation responsibilities under the collective bargaining agreement.

This Local Union will accept photostats of insurance carrier's reports, payroll records, or in any other written form convenient for the company to supply this information. The order in which the above questions have been asked is not to indicate their priority or to in any way describe the format under which the company may choose to answer this request. It is merely a recitation of the information which the Union believes it is entitled to under well-established NLRB precedents.

This Local Union would appreciate receiving these statistics and information, or any part thereof which is readily available, as quickly as possible, in order that we may propose steps to be instituted in order to protect the health and lives of the bargaining unit personnel.

Buck acknowledged that the form of the letter was identical with that proposed in internal correspondence from the leadership of the International Union. The Respondent never responded in writing to the Union's request. At a joint conference on March 24, 1978, however, the Employer's management at Chemolite informed union officials that it would not supply any of the information requested. According to Potthoff, the representative of the International, the Respondent's answer as to each of the items specified in the letter was as follows: (1) the Company did not keep data on morbidity or mortality; (2) the Company felt that raw data on the generic names of substances used and produced at the Chemolite Plant would not help the Union; (3) the Company would not release medical data on the Union, on the ground that such information should be supplied solely to the individual employee and, even then, only if the employee himself, or his physician, requested it; and (4) as to the request for information on industrial hygiene the Respondent declined to supply any written information. Potthoff further testified that the Respondent's officials also protested that any response to the request for certain items would compel the disclosure of trade secrets to their competitors and that, in any event, the Respondent's own hygienists were caring for the welfare of the employees. Finally, Potthoff crediblv testified that at no time did the Respondent's representatives state that production of the data requested would be too costly or burdensome.

The General Counsel contends that the Respondent's failure to supply the information requested by Local 6–418 constituted a refusal to bargain within the meaning of Section 8(a)(5) of the Act. This allegation is denied by the Respondent in its entirety.

The Respondent has a substantial medical staff, consisting of a medical director and numerous physicians, toxicologists, industrial hygienists, engineers, physicists, technicians, nurses, and related personnel who are engaged in a program monitoring the effects of various chemicals, radiation sources, and other substances on the employees and their work environment. It also has extensive provisions for supplying the employees with protective clothing, warnings, and other procedures designed to protect the health and welfare of its work force.

Dr. Frank Ubel, medical director for the Respondent, testified at length about the work in which his staff is engaged to eliminate both the real and potential hazards for employees at the Respondent's plants. Thus, the medical department administers preplacement physical examinations as well as followup examinations and tests, investigates and determines hazardous situations, especially those involving physical, chemical, and bacteriological stress, monitors and regulates radiation sources, and evaluates the toxicity of all raw materials obtained and of any intermediate or final products produced by the Respondent. The Respondent is also involved in attempting to prevent medical and other work-related problems which may result from working with various substances at the Chemolite Plant through specific warnings on

products and raw materials, through discussions at safety meetings with employees, through informing employees of abnormalities that are detected in physical examinations, and through training films that are designed to explain processes and procedures to employees.

Each of the current collective-bargaining contracts which the Respondent has with both Locals involved in this case has an extensive provision on the subject of plant safety. This obligates the Employer to make reasonable provisions for the health and safety of the employees and to provide protective devices and other safety equipment for them. It further provides for regular meetings between representatives of management and employee representatives from each division to be chosen by the Union to discuss overall safety and health subjects and to provide educational programs for the Union's safety and health committee. The agreement also binds the Union to cooperate to the fullest extent in assuring compliance with all rules and regulations of the Respondent's safety program.[8] In the light of the foregoing contractual provisions as well as the extensive testimony which the Respondent offered through Dr. Ubel, members of his staff, and other witnesses, it is apparent that the Respondent acknowledged that employee safety is a matter of grave concern to the Employer and a legitimate subject for collective bargaining.

Similarly, Local 6–418, through its International Union, is aware of numerous problems connected with industrial health and safety problems which have arisen among its membership in other plants. Rafael Moure, industrial hygienist for the International, testified that dibromo choloropropane, a pesticide that is also known as DBCP, Which is produced at the Chemolite Plant, is potentially very dangerous to the health of those who must use it. According to Moure, although this substance has been known as a sterilization agent since at least 1961, at a West Coast plant where the Union has a collective-bargaining agreement nine employees recently were found to be sterile after handling DBCP. Moure further testified that eppichlorohydron is another chemical used by the Respondent and that he has learned that as much as 2,000 pounds of this substance are used each week at the Chemolite Plant. According to Moure, studies of the National Institute of Occupational Safety & Health (NIOSH) have established that exposure to eppichlorohydron can cause damage to the genetic material of cells since it is a mutagen, and that in animals it has been found to be a carcinogen as well as a sterilizer.

James Yamish, a polymer operator at the Chemolite Plant, testified that in the course of his duties he comes in contact with eppichlorohydron, sulphuric acid, isopropynol, caustic solutions, diethyl sulfate, and numerous other reagents. John Rowan, a head operator at Chemolite, and an employee with over 21 years' experience, testified that he uses many of the same substances in his work. He also named hydrochloric acid, acetone, caustics, and dimethyl disulfide, among others. He further testified that he often has throat hoarseness from the fumes after he has worked on a run using dimethyl disulfide. According to Rowan, these raw materials customarily come in drums which are identified only by numbers, and that, although the Employer frequently adds a warning label, the latter is sometimes lacking in much of the specificity contained in the notice which the original vendor pasted on the container. As an illustration, Rowan cited the label which the Respondent had placed on a drum of dimethyl disulfide, a substance he had used on the preceding shift the day he testified. That warning label which the Respondent added appears below:

> DMDS RM 5091
>
> Has a strong, disagreeable sulfur odor. Irritating to the eyes & skin. Avoid inhalation of vapors which will cause temporary headache. Wear rubber gloves for handling.

In contrast with this mild cautionary language of the Respondent, the vendors' label on the drum read:

> RM 5091(DMDS)
> Danger—Flammable
> Vapor maybe hazardous or *fatal* if inhaled. Maybe harmful or *fatal* if swallowed. Use with adequate ventilation. [Emphasis supplied.]

From the evidence in the record it is clear that the work environment at the Chemolite Plant has many real and potential dangers to the health and safety of the employees represented by Local 6–418. Nevertheless, some of the concerns of the bargaining agent and the employees are obviously not shared by the Respondent. For instance, on the subject of eppichlorohydron, James Long, the Respondent's manager of toxicology, testified that although he was aware of some of the potential problems involved in its use, he did not feel they were of sufficient concern to require that the employees be informed of any hazards. According to Long, "We have not instructed the employees at all in eppichlorohydron." These differences in viewpoint are inevitable. And that is why, on issues as vital to the employees as their health and safety, the bargaining agent is entitled to the fullest possible range of information so that it will be able to discuss and negotiate on these matters, in a meaningful fashion, on behalf of those whom it represents.

3. The Respondent's defenses

The Respondent has advanced various arguments to support its position that the Union is not entitled to the information sought in the letter of March 27, 1977. These will now be considered.

Confidentiality: The Respondent asserts that the release of certain information which the Union seeks would disclose trade secrets and that the distribution of medical information about individual employees would violate the physician-patient privilege. The Board, however, in a long line of cases has held that confidentiality is not a defense to refusal to provide information where that information is necessary and relevant to the Union's duty to bargain on behalf of the employees in a unit. *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 717 (1963). Furthermore, the Board has held that a mere as-

[8] See Sec. 1513 of the collective-bargaining contract with Local 6–75, and sec. 1510 of the agreement with Local 6–418.

sertion of confidentiality, without any showing of the reasons for such an assertion, is inadequate as a defense to a refusal to supply the information demanded. In fact, the Respondent here has produced no evidence as to the manner in which release of requested information would damage the Employer.

Much of the information as to health and safety hazards and the toxicity of chemicals is contained in documents in the Respondent's possession which, admittedly, could easily be abstracted from the files. James Long, the Respondent's manager of toxicology, acknowledged that, while the information requested by the Union was contained in documents which might reveal some proprietary information, the amount of such material so classified would be extremely limited. And William Perlson, a patent liaison officer for the Respondent, testified that, out of 700 generic chemical products produced at the Chemolite Plant, the generic name of only 5 or 10 would reveal any sort of trade or proprietary confidence if it came to the attention of any competitors. On cross-examination, when pressed for an answer, Perlson acknowledged that he could think of only one substance whose use, if known to outside competitors, would reveal any trade confidence. In any event, where there may be a potential for abuse of proprietary information on trade secrets, reasonable arrangements may be made through bargaining by the parties which will accommodate the Union's right to relevant information and the Employer's legitimate concern about the careless disclosure of such information. *The Ingalls Shipbuilding Corporation, supra.* Finally, the union representatives who were questioned about this issue testified that the form in which the requested information was submitted to Local 6–418 was unimportant, that it was substance, not form, which mattered. In other words, what the Union desired was data which showed the gross results of tests and other scientifically analyzable information.

Similarly, the Respondent's claim that compliance with the Union's demand would breach the physician-patient privileges is equally unconvincing. At no time has the Union requested the names of any individual employee. This is clear from its original request in the letter of October 27, where it proposed that confidentially of medical records be safeguarded through the use of physicians to interpret and analyze the documents and also by removal from the data of any information which would reveal the identity of the individual whose records were being studied. Dr. Ubel acknowledged that it would not be difficult to purge the records of such identifying characteristics. Parenthetically, it should be added that, from the testimony of the Respondent's witnesses, it is evident that within the Respondent's own headquarters the use of the medical records in question by nonphysician members of the staff may itself violate the privilege which the Respondent is asserting in this case as to those same documents. Even if the Union here were requesting the complete medical records of all employees at the Chemolite Plant there is Board and court authority which would not preclude a disclosure. Notwithstanding an asserted physician privilege. Thus, in one case, where the Board considered the question of whether the physical records of employees should be disclosed to the labor organization which represented those employees, the Board acknowledged that the confidential privilege between physician and patient should be honored "unless and until that individual's physical capacities became relevant to some particular problem." *United Aircraft Corporation (Pratt and Whitney Divison)*, 192 NLRB 382, 390 (1971). Clearly, in the present instance where the medical history of the individual employees is so patently relevant to the Union's effort to promote occupational safety for these same employees, the test established by *United Aircraft* has been met.[9] Further, it should be noted that the Respondent keeps these medical records for the same statistical and analytical purpose for which the Union now seeks to use them.

Burdensomeness: Earlier herein it was found that at the joint company and Union meeting on March 24, 1978, the Respondent did not object to the Union's request for health and safety data on the ground that it was unavailable or that its collection would he burdensome and costly. In the Respondent's brief, however, the argument is advanced that the data in question is either nor readily available or unavailable in the form requested and that to secure some of it would require a search of thousands of documents.

It is well settled that an employer's obligation to provide relevant and material information to the employees' bargaining agent imposes on the Employer the obligation to make a reasonable effort to secure the requested information, and, if unavailable, explain or document the reasons for the asserted unavailability. *M.F.A. Milling Company*, 170 NLRB 1079, 1097 (1968). On the record herein, it is evident that the Respondent has made no effort to supply any of the information sought by Local 6–418. In the conference of the parties on March 24, the Respondent's representatives discussed the questions posed by the Union in most general terms, but offered to supply no data either then, or later, and thereafter nothing, in fact, was passed to the Union. In connection with the medical information which the bargaining agent sought, the Respondent's representative simply proposed that this would have to be secured from the employees themselves. This response, of course, did not relieve the Respondent of a continuing obligation to meet the Union's request for information relevant and material to its concern about working conditions. *The Kroger Company*, 226 NLRB 512, 513, 514 (1976); *Film Editing Equipment Corp. d/b/a Hollywood Film Company*, 213 NLRB 584, 592 (1974).

From the testimony of the Respondent's own witnesses it is clear that the Respondent operates a large medical department which quite obviously parallels the outline of the requests advanced in the Union's letter of October 27, 1977. From the very outset of an individual's initial employment with 3M, the medical department maintains records and a complete medical history on the individual; it frequently runs test on the employees by

[9] Cf. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103 (1954), where Mr. Justice Frankfurter observed: "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."

plant and specific department to ascertain the effects of certain chemicals and processes on the work force and then tabulates and analyzes the results; through its toxicological department it analyzes the chemical properties and potential hazards of all raw materials used and procured from suppliers; through its industrial hygiene department it analyzes the work environment and makes recommendations regarding the use of specific chemicals and processes, and thereafter, by followup procedures it takes measurements once those processes have begun. In connection with radiation problems it monitors all sources of radiation and pursuant to various statutes it supplies reports on these tests to several agencies of the Federal Government. From the testimony of the Respondent's witnesses, it is apparent that the Respondent has extensive files, which it keeps current, wherein it maintains much, if not all, of the information requested by the Union. Thus, from the testimony of James Long, manager of toxicology, it appears that documents containing some of the information sought could readily be excised from files in his department. And from the testimony of John Fuchs, manager of industrial hygiene services, it is evident that more of the requested data could be secured either from existing records[10] or detached from portions of reports that are already on file.

The record does not establish that the retrieval or reproduction of the requested information would be burdensome to the Respondent. Nor was there any offer to provide the information if the Union would share in the cost of retrieval or duplication.[11] In any event, as to this issue, the Board has held:

> If there are substantial costs involved in compiling the information in the precise form and at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs, and, if no agreement can be reached, the Union is entitled in any event to access to records from which it can reasonably compile the information. If any dispute arises in applying these guidelines, it will be treated in the compliance stage of the proceeding. [*Food Employers Council, Inc., et al.*, 197 NLRB 651 (1972).]

Further, and in connection with this same issue, the Board has more recently, after quoting the above passage from *Food Employers Council*, made the following statement:

> . . . Respondent must make an effort to inform the Union of the nature of the information compiled by it, so that the Union may, if necessary, modify its requests to conform to the available information. If substantial costs would in fact be incurred, we expect the parties to bargain as to the allocation of those costs. [*Westinghouse Electric Company*, 239 NLRB 106 at 113.]

[10] According to Mr. Fuchs, the historical monitoring data for the Chemolite Plant, one of the areas on which the Union seeks information, are kept in his department on approximately 8,000 sheets of paper. He also stated, however, that this information has not been coded for automatic data processing retrieval.

[11] See the testimony of John Fuchs.

Waiver: In its brief the Respondent urges that, since the current collective-bargaining agreements have provisions for joint labor and management committees to meet and discuss matters of health and safety, the Unions have waived their right to request safety and health information of the type and scope set forth in the letter of October 27, 1977. There is no merit to this argument. As found earlier, the Union's right to the data requested is a right which it derives from Section 8(d) of the Act. Although the Board and the Courts have held that such a right may be relinquished under the provisions of a collective-bargaining contract, such relinquishment must be in "clear and unmistakable" language. *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098 (1949); *The Timken Roller Bearing Company* v. *N.L.R.B*, 325 F.2d 746, 750–751 (6th Cir. 1963); *N.L.R.B.* v. *The Item Company*, 220 F.2d 956, 958–959 (5th Cir. 1955), cert. denied 350 U.S. 836 (1955); *Cowles Communications, Inc.*, 172 NLRB 1909, 1918–19 (1968); *The Kroger Company*, 163 NLRB at 447. The collective-bargaining agreement between the Respondent and Local 6–418 contains no such waiver either in "clear and unmistakable" language, or even impliedly.

On the basis of the findings set forth above, it is now found that the information requested by Local 6–418 is relevant to its function as the employee bargaining representative and that it is needed for the purposes of informing and protecting the employees as well as determining whether the Respondent is in compliance with the health and safety regulations imposed by OSHA and other Federal and state agencies. By its failure to comply with the Union's request for this information the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce and the Unions are labor organizations, all within the meaning of the Act.

2. By its conduct set forth and found in section III, *supra*, the Respondent has engaged and is continuing to engage in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

3. Said unfair labor practices affect, and unless permanently enjoined, will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed violations of Section 8(a)(5) and (1) of the Act, it will be recommended that the Respondent be ordered to take certain affirmative action to effectuate the policies of the Act. Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Unions certain information, it will be recommended that the Respondent furnish Local 6–75 and 6–418 its affirmative action plans wich respect to employees in the appropriate units here involved. In addition the Respondent should be ordered to supply Local 6–418 the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, statistical data related to working

conditions, and the generic names of all chemicals and substances used or produced in the Respondent's Chemolite plant.

As found by the Board in *Westinghouse Electric Corporation*, 239 NLRB 106, the manner in which the Respondent must make the statistical information available to the Unions, and the allocation of "substantial costs," if any, shall be determined, in accordance with *Food Employers Council, Inc., et al.*, 197 NLRB 651 (1972). Finally, under the circumstances present here, and in view of the long history of collective bargaining between the parties, it dces not appear that a remedial order is warranted and that the Respondent should be ordered only to cease and desist from the unfair labor practices found and from in any like or related manner infringing upon the employee rights guaranteed in Section 7 of the Act. *Westinghouse Electric Corporation, supra.*

[Recommended Order omitted from publication.]